IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/04/2003

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION No.4695 of 2003
and W.P.Nos.6930,6053 OF 2003 and
46800 & 46801 of 2003
AND
WPMP.NOs.5949,8920,7787 OF 2003 and
67975 & 67976 of 2002

M/s. South India Exports,
No.10, Nainian Street,
Park Town, Chennai 600 003.
Rep. by its Partner
Mr. Indermal Ramani .. Petitioner in WP.No.4695/03

M/s. Parman Exports,
Rep. by its Proprietor,
Mr. Manish Kumar Jain,
No.210, Mint Street,
Park Town,Chennai 3. .. Petitioner in WP.No.6930/03

M/s. Vardariya Exporters,
No.14, Paramasiva Street,
Park Town, Chennai 3.
rep. by its Proprietor,
Mr.K. Parasmal Jain. .. Petitioner in WP.No.6053/03

M/s. Bhavani Exports,
No.15, Ponnappa Lane,
Waltax Road, Chennai 600 003.
Rep. by its Proprietrix
Mrs. Bhanwari Bai .. Petitioner in WP.No.46800/02

M/s. Chamundi International,
No.15, Ponnappa Lane,
Waltax Road, Chennai 600 003.
Rep. by its Proprietor
Mr.s. Babu Singh .. Petitioner in WP.No.46801/02

-Vs-

1. The Joint Director of Foreign Trade,
Office of the Joint Director
of Foreign Trade,

38-39, Whites Road,
Royapettah, Chennai 14.

2. The Senior Intelligence Oficer,
Director of Revenue Intelligence,
25, Gopalakrishnan Iyer Road,
T. Nagar, Chennai 17. .. Respondents in all WPs

Petitions filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari as stated therein.

For Petitioner : Mr.V.T. Gopalan,
in WP.4695/03 Senior Counsel for
Mr.M. Lakshmipathi

For Petitioners
in WP.6930 & 6053/03,: Mr.K.M. Vijayan
46800 & 46801/02 Senior Counsel for
M/s.MCGan Law Firm

For Respondents : Mr.K. Veeraraghavan, SCGSC

:J U D G M E N T

These writ petitions were heard on merit on the consent of the counsels appearing for the parties at the stage of consideration of the stay petition. Common prayer in al the writ petitions is for quashing the notice issued by the second respondent dated 7.2.2002 under Section 108 of the Customs Act.

2. The facts giving rise to the W.P.No.4695 of 2003 are as follows:-

The Union Government has formulated Export Import Policy under Section 3 of the Foreign Trade (Development and Regulation) Act, 1992, hereinafter referred to as Foreign Trade Act. Under the Export Import Policy, concessions were given for import as well as export. One such concession relates to import of raw materials in advance without payment of duty with an obligation to export. Under Export Import Policy, the licensing authority, namely the first respondent is the authority vested with the power of montioring and to enforce the conditions of the licence under Sections 8,9 and 11 of the Foreign Trade Act. It is the assertion of the petitioner that even though the second respondent has no jurisdiction in the matter, he is continuously harassing the petitioner by issuing notice for personal appearance. It has been asserted that the action of the second respondent in issuing notice under Section 108 of the Customs Act, 1962 is illegal and without jurisdiction. It has been further stated that Section 108 of the Customs Act can be invoked in connection with smuggling of any goods and in the absence of any smuggling of goods, violation or contravention in the matter relating to export or import can be dealt with by the first respondent and not by the second respondent. On these grounds, the notice issued by the

second respondent has to be quashed.

3. The allegations in the connected writ petitions are similar.

4. A counter affidavit has been filed on behalf of the second respondent refuting the contentions raised by the petitioner.

5. I have heard Sri.V.T. Gopalan, Senior Advocate for the petitioner in W.P.No.4695 of 2003 and Sri.K.M. Vijayan, Senior Advocate in the connected matters and Sri.K.Veeraraghavan, Senior Central Government Standing Counsel for the respondents.

6. Learned counsels appearing for various petitioners have contended that since the notice issued by the second respondent is without jurisdiction and without authority of law, the petitioner in various writ petitions have approached this Court under Article 226 of the Constitution even at the threshold. For the aforesaid purpose, Sri.V.T. Gopalan has placed reliance upon the decision reported in 1985(2) SCC 412 (CHIEF OF ARMY STAFF AND OTHERS v. MAJOR DHARAM PAL KUKRETY) and AIR 1999 SC 22 (WHIRLPOOL CORPORATION v. REGISTRAR OF TRADE MARKS, MUMBAI AND OTHERS).

7. Law is well settled that when action is sought to be taken by any authority without any jurisdiction, there is no embargo on the High Court to deal with the matter even at the stage of notice.

8. In A.I.R 1999 SC 22 (cited supra), it was observed :

 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or whether there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

9. In 1985(2) SCC 412 (cited supra) relied upon by the learned senior counsel appearing for the petitioner, it was observed as follows :

 5. The same contentions, as were raised before the High Court, were taken before us at the hearing of this appeal. We will first deal with the

appellants preliminary objection that the respondents writ petition was not maintainable as being premature. It was the respondents case that the Chief of the Army Staff had no jurisdiction to issue the impugned show cause notice after he had been again found not guilty by the court-marital on revision. The said notice expressly stated that the Chief of the Army Staff was of the opinion that the respondents misconduct as disclosed in the proceedings rendered his further retention in service undesirable and asked him to submit his explanation and defence, if any, to th e charges made against him. If the respondent's contention with respect to the jurisdiction of the Chief of the Army Staff to issue the said notice were correct, the respondent was certainly exposed to the jeopardy of having his explanation and defence rejected and he being removed or dismissed from services. Were the said notice issued without jurisdiction, the respondent would have then suffered a grave, prejudicial injury by an act which was without jurisdiction. Where the threat of a prejudicial action is wholly without jurisdiction, a person cannot be asked to wait for the injury to be caused to him before seeking the courts protection. If, on the other hand, the Chief of the Army Staff had the power in law to issue the said notice, it would not be open to the respondent to approach the court under Article 226 of the Constitution at the stage of notice only and in such an event his writ petition could be said to be premature. This was, however, not a contention which could have been decided at the threshold until the court had come to a finding with respect to the jurisdiction of the Chief of the Army Staff to issue the impugned notice. Having held that the impugned notice was issued without any jurisdiction, the High Court was right in further holding that the respondents writ petition was not premature and was maintainable.

10. Keeping in view the aforesaid proposition of law, the question to be decided is as to whether the second respondent has jurisdiction to issue notice or summon.

11. On this aspect, the first contention raised by the learned senior counsel is to the effect that notice under section 108 of the Customs Act, as the section itself envisages, can be issued by any gazetted officer of customs and the second respondent, who is the Senior Intelligence Officer in the Office of the Directorate of Revenue Intelligence, not being a gazetted officer of customs had no jurisdiction to issue notice.

12. For the aforesaid purpose, the learned senior counsel for the petitioner has placed reliance upon Section 3 of the Customs Act, which enumerates classes of officers of customs. Section 3(f) refers to other class of officers of customs as may be appointed for the purposes of this Act and Section 4 of the Customs Act empowers the Central Government to appoint such persons as it thinks fit to be officers of customs. It is pointed out by the learned senior counsel for the petitioner that as per the counter affidavit filed by the second respondent reference has been made to notification dated 8.6.1999 which amended the earlier notification dated 26.4.1990. In such Notification No.36/99, certain officers of DRI (Directorate of Revenue Intelligence) have been appointed as officers of customs, but Senior Intelligence Officer is not one such notified officer.

13. In reply to such contention, the learned Senior Central Government Standing Counsel has referred to Notification No.31/97-Customs (N.T.) dated 7.7.1997. The aforesaid notification clearly refers to appointment of all officers of Directorate of Revenue Intelligence as officers of customs. Such notification has been issued in exercise of the power conferred under Section 4(1) of the Customs Act. Therefore, there cannot be any doubt that the Senior Intelligence Officer of the Directorate of Revenue Intelligence is also a gazetted officer of customs. Incidentally it may be pointed out that there is no denial that the Senior Intelligence Officer is a gazetted officer, but the only dispute is whether the Senior Intelligence Officer of the DRI has been notified to be an officer of customs as envisaged under Section 4(1) of the Customs Act. In such view of the matter,the first contention raised by the learned counsels appearing for the petitioner in all the cases must fail.

14. The second contention of the learned counsel appearing for the petitioner is to the effect that the import and export by the persons availing advance licence under the duty free scheme is to be monitored by the first respondent as such import and export policy has been framed by the Union Government under Section 3 of the Foreign Trade Act. It has been further submitted that as a matter of fact, some notices have been issued by the respondent No.1 and the matters are yet to be finalised and therefore, there is no parallel jurisdiction vested with the second respondent to initiate any proceedings or issue any notice.

15. Such a contention appears to be attractive on the face of it, but on a closer scrutiny, it is difficult to accept the same. Even though both the Acts cover different aspects, it is obvious that both the Acts are complementary to each other in nature. The object of the Foreign Trade Act is to provide for development and regulation of foreign trade by facilitating imports into and augment export from India and the matters connected there with or incidental thereto. The object of the Customs Act is to consolidate and amend the law relating to customs. However, the two Acts are not mutually exclusive nor there is any apparent conflict between the two.
16. While considering a similar matter under Sea Customs Act vis-a-vis (Exports) Control Order, the Supreme Court had the occasion to consider the question in AIR 1966 197. It was observed :

 9. Is there any conflict between the two jurisdictions, i.e., the jurisdiction of the licensing authority under the Exports (Control) Order and that of the Customs Authority under the Sea Customs Act? While under the Exports (Control) Order certain articles can be exported only under a licence issued by the appropriate authority prescribed thereunder, the appropriate Customs Authority can prevent the export of the articles if they are not covered by such licence. To take an extreme case, if the licence issued per mitted the export of iron and the licensee seeks to export gold, the Customs Authorities can certainly prevent the export of gold, for it is not covered by the licence. In this view, there is no conflict between the jurisdiction of the two authorities: indeed, their functions are complementary to each other.

17. Subsequently, the question again cropped up under the Customs Act vis-a-vis Export Import Policy in the decision reported in 1996(88) E.L.T. 626 (S.C). The Supreme Court while considering the question had occasion to observe as follows :-

 9. It was argued that the trade also understood likewise. But this argument was repelled by the Tribunal by observing that classification of goods can never be based on what the industry regards the goods to be. This approach seems contrary to the view expressed by this Court in Rollatainers case. There this Court approved the test based on understanding of trade parlance/common parlance of a particular product. In the case on hand, but for the printing, the aluminium label would serve no purpose and as seen above, it is the printing on the aluminium sheet, which communicates the message to the buyer that makes the sheet as a label, unlike a carton printed or plain which always remained a carton.

10. The label announces to the customer that the product is or is not of his choice and his purchase of the commodity would be decided by the printed matter on the label. The printing of the label is not incidental to its use but primary in the sense that it communicates to the customer about the product and this serves a definite purpose. This Court in Rollatainers case held that what is exempt under the notification is the product of the printing industry. The product in this case is the carton. The printing industry by itself cannot bring the carton into existence. Let us apply this above formula to the facts of this case. the product in this case is the aluminium printed label. The printing industry has brought the label into existence. That being the position and further the test of trade having understood this label as the product of printing industry, there is no difficulty in holding that the labels in question are the products of the printing industry. It is true that all products on which some printing is done, are not the products of printing industry. It depends upon the nature of products and other circumstances. Therefore, the issue has to be decided with reference to facts of each case. A general test is neither advisable nor practicable. We are, therefore, of the opinion that the Tribunal was not right in concluding that the printed aluminium labels in question are not products of printing industry.

11. Accordingly, the appeals are allowed the the impugned orders of the Collector, Central Excise are set aside and the appellants are entitled to claim exemption on the labels in question under the above mentioned Notification. There will be no order as to costs.

18. As against the aforesaid two decisions, which appear to be applicable, Sri K.M. Vijayan, learned senior counsel for some of the petitioners has placed reliance upon the decision reported in 2003 (151) ELT 254 . On careful perusal of the aforesaid decision, I do not find any thing which runs contrary to the earlier decisions, particularly the decision reported in 1996(88) ELT 626 (cited supra), which appears to be directly on the point.

19. In view of the aforesaid reasons, the second contention raised by the learned counsels for the petitioners also fails.

20. Learned senior counsels for the petitioners have also contended that Section 108 of the Customs Act empowers issuance of summons when there is □smuggling of any goods□ and even assuming that there are improper import or export under the Foreign Trade Act, it cannot be said that there is smuggling of any goods. This contention overlooks the meaning of the expression □smuggling□ which has been defined under Section 2(39) of the Customs Act is as follows:

□ □smuggling□ in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113.□

The expression has to be understood in the light of the definition furnished and not in its popular sense. Section 111 contained in Chapter XIV relates to confiscation of goods and conveyances and imposition of penalties. Section 111(o) makes it clear that any goods brought from outside the India is liable to confiscation, if , in respect of such goods condition is not observed unless the non-observance of the condition was sanctioned by the proper officer. Whether any action is to be taken under Section 111 or not is a matter to be decided by the appropriate authority. At this stage, it cannot be said that there is no justification in issuing notice/summons. As a matter of fact, the decision reported in 1996(88) E.L.T. 626 (cited supra), which has already been noticed, makes this aspect very clear.

21. The learned counsels appearing for the petitioners have submitted various details justifying the action of the petitioners. However, it would not be proper to examine these aspects as such matters pertaining to merit should be considered by the appropriate authority.

22. For the aforesaid reasons, I do not find any merit in the writ petitions which are accordingly dismissed. It is made clear that the matters pertaining to merit to be dealt with by the appropriate authority in accordance with law. No costs. Consequently, the connected miscellaneous petitions are closed.

Index : Yes
Internet : Yes
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To
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of Foreign Trade,
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2. The Senior Intelligence Oficer,

Director of Revenue Intelligence,
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